

[J-218-97]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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| ESTATE OF LYNN S. WITTHOEFT, | : | No. 16 M.D. Appeal Docket 1997 |
| | : | |
| v. | : | Appeal from the Order of the |
| | : | Superior Court dated May 15, 1996 |
| | : | at No. 321 HBG 1995, affirming the |
| JAMES C. KISKADDON, | : | Order of the Court of Common Pleas |
| | : | of Franklin County dated March 21, |
| | : | 1995 at No. AD 1994-46S |
| | : | |
| APPEAL OF: HENRY G. WITTHOEFT | : | 450 Pa. Super. 364, |
| | : | 676 A.2d 1223 (1996) |
| | : | |
| | : | ARGUED: December 9, 1997 |

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: JULY 8, 1999

I must respectfully dissent because the majority fails to see the forest for the trees. Contrary to the position of the majority, I believe that an ophthalmologist should be held liable to a third party for injuries caused by his patient's operation of a motor vehicle when the ophthalmologist has failed to inform the Pennsylvania Department of Transportation (PennDOT) of that patient's poor visual acuity, as he is required to do by law.

As noted by the majority, Helen Myers was a patient of Dr. Kiskaddon, an ophthalmologist. In March of 1983, Dr. Kiskaddon examined Ms. Meyers and determined that she had a visual acuity of 20/80 combined. Under the Motor Vehicle Code, a person with visual acuity of less than 20/70 combined with best correction is not authorized to drive and a physician is required to report a patient diagnosed with this level of visual acuity to PennDOT. Nonetheless, Dr. Kiskaddon failed to notify PennDOT of Ms. Meyers' condition

and allegedly failed to inform Ms. Meyers that she was not legally authorized to drive in Pennsylvania.

Four months after Dr. Kiskaddon's examination of Ms. Meyers revealed that her visual acuity was less than 20/70 combined, Ms. Meyers was operating a motor vehicle on Walker Road. She struck a bicycle being ridden by Lynn Witthoeft, who died as a result of injuries sustained in the accident. Appellant, as Ms. Witthoeft's husband and the personal representative of her estate, filed a complaint against Dr. Kiskaddon. The complaint alleged that Ms. Meyers' inability to see had caused the accident and that Dr. Kiskaddon was liable for failing to inform Ms. Meyers that she was not legally authorized to drive in Pennsylvania due to her poor eyesight and for failing to notify PennDOT of Ms. Meyers' impaired visual acuity.

As the majority explains, the Motor Vehicle Code requires physicians to report patients to PennDOT who are diagnosed with certain conditions that would affect their ability to drive safely. Specifically, section 1518 (b) of the Code requires physicians to report to PennDot the name, date of birth, and address of each person diagnosed as having a specified disorder or disability. 75 Pa. C.S. §1518 (b). The applicable list of disorders and disabilities, found in the regulations promulgated under the Code, includes a person diagnosed with a visual acuity of less than 20/70 combined. See 67 Pa. Code § 83.3.

These provisions clearly imposed a duty on Dr. Kiskaddon to report Ms. Meyers' eye examination results to PennDOT. The majority finds, however, that Dr. Kiskaddon's failure to comply with his statutory duty does not give rise to a private remedy essentially because such a remedy is inconsistent with the purpose of the Motor Vehicle Code's reporting requirements and the general statutory scheme of the Code. I cannot agree.

In my view, the purpose of the reporting requirements could not be clearer. Requiring doctors to report to PennDOT those drivers who have been diagnosed with

certain medical conditions that will affect their ability to drive safely, such as a visual acuity of less than 20/70, serves first and foremost to protect motorists and pedestrians from injury caused by persons who should not be driving because it is unsafe for them to do so. As stated by the Secretary of Transportation upon readoption of the reporting requirements:

The Department also explained that without readoption of these regulations, the Department would be left without any medical standards for licensure; consequently, even individuals with severe vision problems . . . would be eligible for licensure, **creating an unacceptable level of risk on our highways.**

PA Bulletin, Vol. 21, No. 16, April 20, 1991 (emphasis added).

This statement reflects what I believe to be the obvious intent of the reporting requirements at issue here-- a doctor is required to report a person diagnosed with severe visual impairment, such as Ms. Meyers, to PennDOT in order to protect people on the highways from drivers who are too visually impaired to drive safely. In my view, a doctor's duty to report certain medical conditions to PennDOT is not merely an administrative benefit to the Commonwealth, as the majority suggests. Rather, under the Code, the doctor serves as a critical link in highway safety by alerting PennDOT to those drivers who have been diagnosed with medical conditions that put them at risk of injuring themselves or others on the road. Without compliance by the doctors of this Commonwealth, PennDOT's ability to act preventatively and proactively in removing medically unsafe drivers from the road **before** a traffic incident occurs would be severely hampered. In light of a doctor's express statutory duty and what I see as the plain intent of the reporting requirements, it seems only logical that a doctor should be liable to a third party for injuries caused by a patient's poor visual acuity when the doctor has failed to report that patient's condition to PennDOT.

Similarly, in DiMarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990), this Court held that a physician owes a duty to a third-party where the physician fails to properly advise a patient who has been exposed to Hepatitis B, and the patient, relying on

the doctor's advice, spreads the disease to a third party. The DiMarco Court noted that Pa. Code 27.115 specifically requires physicians to report cases of Hepatitis B to the local authority and that such a statutory duty was enacted for the purpose of protecting third parties. Id., 583 A.2d at 425. As in DiMarco, Dr. Kiskaddon had a clear statutory duty to report Ms. Meyers' poor visual acuity to PennDOT, but failed to do so. In both this case and in DiMarco, the statutory duty was enacted to protect third parties. Thus, I believe that Dr. Kiskaddon's failure to report Ms. Meyers' condition to PennDOT exposes him to liability to a third party under DiMarco.¹

In distinguishing this case from DiMarco, the majority first notes that the DiMarco Court placed great emphasis on the medical condition at issue there - communicable diseases. The majority observes that because this case, unlike DiMarco, does not involve a "communicable disorder or a disorder of imminent threat to health," it does not implicate the policy issues present in DiMarco. I find this reasoning unpersuasive, especially when the facts of this case demonstrate that a person who drives when he or she is severely visually impaired can kill another motorist or pedestrian. Thus, although poor vision may not be a communicable disease, I cannot agree with the majority that poor vision in circumstances such as these should not be considered an imminent public health risk. In both cases, the doctor's failure to comply with his statutory duty created an immediate clear and present danger to third parties.

I also cannot agree with the majority's conclusion that DiMarco is distinguishable from this case because Ms. Myers did not rely on erroneous advice given by Dr. Kiskaddon but

¹ The majority concludes that unlike the victim in DiMarco, Ms. Witthoeft was not a foreseeable victim of Dr. Kiskaddon's failure to act in this case. I disagree. Instead, I believe that a person lawfully bicycling on a public road, such as Ms. Witthoeft, is within the foreseeable risk of harm created by a doctor's failure to inform a patient that her visual acuity is less than what the legal standard requires for driving in Pennsylvania and to report that patient's impaired visual acuity to PennDOT.

rather was “in the best position to know the effects, if any, that her visual acuity would have on her driving.” Although Ms. Meyers most likely realized that her vision was failing, I can only assume that Ms. Meyers went to her eye doctor, as a specialist, seeking information and advice regarding her visual acuity. Since ophthalmology is Dr. Kiskaddon’s specialty, it would seem to me that he, and not Ms. Meyers, was in the best position to understand the effects of Ms. Myers’ poor visual acuity on her driving. Thus, it makes sense that the Motor Vehicle Code imposes the duty on the doctor, and not the patient, to report medical conditions which are presumed to impair a patient’s ability to drive.

In sum, it seems clear that the legislature enacted the reporting requirements to ensure that physicians report patients with certain medical conditions so that PennDOT can take steps to prevent medically-impaired individuals from driving and harming themselves or others who are on the road. Because Dr. Kiskaddon failed to comply with his statutory duty, I believe that he owes a duty to a third party who was injured as a result of that noncompliance. Thus, I would reverse the order of the Superior Court, affirming the trial court’s grant of Appellees’ preliminary objections in the nature of a demurrer, and let this case proceed to trial.